IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ANTHONY GENE HAND, Appellant.	No. 33186-1-II UNPUBLISHED OPINION

PENOYAR, J. — Anthony Gene Hand appeals his conviction for possession of methamphetamine. He claims that the trial court should have suppressed the drugs found on his person during a search incident to arrest because his arrest was illegal. We hold that: (1) Hand cannot claim that his arrest was illegal because he did not raise the issue at trial and (2) sufficient evidence supports the finding that Hand had dominion and control over the truck containing drug paraphernalia. We affirm.

FACTS

I. Background

On May 3, 2004, Pierce County Sheriff Deputies Cory Shears and Darrin Rayner were on patrol when they saw Hand behind a Goodwill store in Tacoma loading a box into the bed of a truck. It was about ten o'clock at night, the store was closed, and no other person was around.

Rayner contacted Hand as he was getting into the truck's driver seat. Shears went around to the passenger side. He saw that the glove box was open and a glass commonly used for a smoking pipe was lying on top of the open glove box door. The pipe had residue in the bottom indicating it had been used for smoking methamphetamine.

The deputies arrested Hand for possession of drug paraphernalia and read him his *Miranda*[1] rights. The deputies also suspected that he was stealing items left for donation at the Goodwill, although the subsequent police report did not indicate that Hand had any items taken from the donation site.

The deputies searched Hand's person incident to arrest and found methamphetamine, knives, numerous bags usually used for distributing methamphetamine, and $3,630 in cash. They checked the computer and determined that the truck's last registered owner was Stephen Klasinski,[2] who sold the truck in 2003. The new owner had not transferred title into his or her name.

II. Procedural history

The State charged Hand with unlawful possession of methamphetamine with intent to deliver.

Hand moved the trial court to suppress the fruits of the search and dismiss the charges against him. He argued that the police did not have probable cause to arrest him because his mere presence near the truck was insufficient to connect him to the truck in which the pipe was found. He also moved to dismiss the charge based on *State v. Knapstad*,[3] arguing that the evidence was insufficient to show that he intended to deliver drugs to another.

Hand testified at his suppression hearing that he rode his bicycle to the Goodwill store with a box of items he intended to donate strapped to the back of his bicycle. Hand claimed that

---

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d. 694 (1966).

[2] The record contains several different name spellings. We use the one from the findings of fact.

[3] 107 Wn.2d 346, 729 P.2d 48 (1986).

when he arrived at the store, two trucks were already there. He said he helped an older man unload a mattress from one of the trucks and then the man left with his truck. Hand said that another man was still there outside the Goodwill digging around in the boxes outside the store when the police arrived. Hand claimed that he had just taken the box from his bicycle and was holding it when the officers questioned him. He denied that he had ever tried to get inside the second truck.

The trial court denied both of Hand's motions. In its findings of fact and conclusions of law, the trial court specifically found that Hand had dominion and control over the truck and its contents, that Hand's testimony was not credible, and that Shears's testimony was credible.

At trial, the jury convicted Hand of only the lesser included offense of unlawful possession of methamphetamine. Hand now appeals.

ANALYSIS

I. Search incident to arrest

Hand claims that the pipe inside the truck was insufficient to establish probable cause to arrest him. He argues that mere possession of drug paraphernalia is not a crime. *See State v. O'Neill*, 148 Wn.2d 564, 62 P.3d 489 (2003). He also argues that the trial court made no clear and specific factual findings concerning the pipe, its suspected contents, or Hand's use of the pipe. He claims that, because there was no probable cause to arrest him for possession of drug paraphernalia, his arrest was illegal. Hand further argues that, because he was not lawfully arrested, the subsequent search incident to arrest was illegal and the fruits of that search were not admissible at trial.

Hand also argues that the search incident to arrest was invalid because he was merely being detained at the time he was searched, but

was not formally arrested. He further claims that his arrest was non-custodial and, therefore, the search of his person was improper. *State v. McKenna*, 91 Wn. App. 554, 561-62, 958 P.2d 1017 (1998) (search improper where the police had already determined that they would not be taking the defendant into custody).

As a general rule, we do not consider issues raised for the first time on appeal. RAP 2.5(a). However, a claim of error may be raised for the first time on appeal if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3).

RAP 2.5(a)(3) is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify some constitutional issue not raised before the trial court. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Rather, the asserted error must be "manifest"--i.e., it must be "truly of constitutional magnitude." *McFarland*, 127 Wn.2d at 333. The defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant's rights; it is this showing of actual prejudice that makes the error "manifest," allowing appellate review. *McFarland*, 127 Wn.2d at 333. If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest. *McFarland*, 127 Wn.2d at 333.

Because Hand did not raise these issues at trial, he cannot raise them for the first time on appeal. *State v. McNeal*, 98 Wn. App. 585, 594, 991 P.2d 649, *aff'd*, 145 Wn.2d 352 (1999) (defendant may not challenge for the first time on appeal the admission of evidence seized in warrantless searches). Hand did not claim in his pretrial motions that his arrest was illegal, nor did he claim that the search took place before the deputies placed him under custodial arrest. Because the trial court was not asked to consider the arguments Hand now raises, the record was not developed for appeal. We decline to

consider these arguments now.

II. Hand's possession of the truck and the pipe

Hand next argues that the trial court erred in ruling that he possessed either the truck or the pipe. He claims that the evidence was not sufficient to show that he had "dominion and control" over the truck. Br. of Appellant at 26. He argues that the truck was not registered to him and that no keys were found inside the vehicle or on his person. He also claims that the trial court did not make specific factual findings concerning where he was in proximity to the truck, whether he had a possessory interest in the truck, or whether he was a passenger or driver of the truck. Because the trial court lacked evidence that he possessed the truck or its contents, Hand claims that the trial court erred in determining that police had probable cause to arrest him based on what they saw in the truck.

We review findings of fact related to a motion to suppress under the substantial evidence standard. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. *Mendez*, 137 Wn.2d at 214. We review de novo the conclusions of law pertaining to the suppression of evidence. *Mendez*, 137 Wn.2d at 214.

The State may establish that possession is either actual or constructive. *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994). Constructive possession requires that the defendant have dominion and control over the contraband or the premises where the contraband is found. *State v. Morgan*, 78 Wn. App. 208, 212, 896 P.2d 731, *review denied*, 127 Wn.2d 1026 (1995). A vehicle is a "premises" for purposes of this inquiry. *State v. Huff*, 64 Wn. App. 641, 654, 826 P.2d 698, *review denied*, 119 Wn.2d 1007 (1992).

Here, substantial evidence supported the

trial court's finding that Hand had dominion and control over the truck and its contents. The trial court's findings identified the information from Shears's testimony that supported its findings: Hand was standing near the truck's driver side, he was placing items into the truck's bed, and he was attempting to get into the truck's cab when Rayner stopped him.

To the extent that the trial court believed Shears's testimony and disbelieved Hand's, is a credibility determination that we do not review on appeal. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Penoyar, J.

We concur:

Quinn-Brintnall, C.J.

Armstrong, J.